85-945 (2)

Supreme Court, U.S.
FILED
JAN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,

Petitioner,

v.

THE STATE OF SOUTH DAKOTA, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF JACKSON COUNTY, SOUTH DAKOTA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT A. SAMBROAK, JR.
Counsel of Record for
Jackson County, South Dakota
P.O. Box 400
Kadoka, South Dakota 57543
Telephone: (605) 837-2284

BEST AVAILABLE COPY

40 p

QUESTION PRESENTED FOR REVIEW

Whether the consolidation of two of its counties by the State of South Dakota is prohibited by federal law or infringes on the Oglala Sioux Tribe's right of self-government when the consolidation includes a portion of the Pine Ridge Indian Reservation.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals which is the subject of this petition for writ of certiorari is reported at 770 F.2d 730 (1985). The opinion of the United States District Court granting judgment in favor of the Respondents and affirmed by the Eighth Circuit was unpublished.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Pursuant to Rule 34.1(b) of the Rules of the Supreme Court of the United States, the following is a list of all parties to the proceedings before the Eighth Circuit Court of Appeals: the Oglala Sioux Tribe, Appellant; the State of South Dakota; Jackson County, South Dakota, a political subdivision of the State of South Dakota; Jackson County Auditor Vicki Wilson; and Jackson County Commissioners Bruce Conlee, Robert Holcomb, Ron Gartner, Clarence Reutter, and Jack Evans, Appellees.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	ii
PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. FACTUAL BACKGROUND	1
B. PROCEEDINGS BELOW	5
SUMMARY OF ARGUMENT	8
ARGUMENTS AND AUTHORITIES	9
THE UNITED STATES COURT OF APPEALS WAS CORRECT IN HOLDING THAT A STATE IS NOT PRECLUDED FROM INCLUDING AN ORGANIZED COUNTY WITHIN THE BOUNDARIES OF AN INDIAN RESERVATION.	9
A. GENERAL PRINCIPLES	9
B. THE PRESENT CASE	14
CONCLUSION	26
APPENDICES	

TABLE OF AUTHORITIES

CASES:	PAGE
Arizona v. San Carlos Apache Tribe, 103 S.Ct. at 3210-3212, and n. 12	19, 20
Draper v. United States, 164 U.S. 240 (1896)	11, 20
Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975)	3
McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 171 (1973)	10, 13
Merrion v. Jicarilla Apache Tribe, 450 U.S. 130, 151 (1981)	17
Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 481-483 (1976)	11, 12
Montana v. United States, 450 U.S. 544 (1981)	20
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-336 (1983)	14
Puyallup Tribe, Inc. v. Department of Game of Washington, 433 U.S. 165 (1977)	25
Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 836-838 (1982)	14
Rice v. Rehner, 436 U.S. 713, 103 S.Ct. 3291 (1983)	12

PAG

Three Affiliated Tribes v. Wold Engineering, 104 S.Ct. at 2271, 2274-2275 2

United States v. Antelope, 430 U.S. 641, 644, n. 4 (1977) 1

United States v. Dodge, 538 F.2d 770, 775 (8th Cir. 1976), cert. denied, 429 U.S. 1099 (1977) 1

United States v. McBratney, 104 U.S. 621 (1882) 1

United States v. Rickert, 188 U.S. 432, 25 S.Ct. 478, 482 (1903) 1

United States v. Wheeler, 435 U.S. 313, 323 (1978) 2

Washington v. Confederated Tribes, 447 U.S. 134 (1980) 11, 1

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) 2

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) 1

Williams v. Lee, 358 U.S. 217 (1959) 1

Worcester v. Georgia, 5 Pet. (31 U.S.) 515, 557 (1832) 1

PAGE

OTHER REFERENCES:

25 U.S.C. 231 — 12

43 U.S.C. 666 — 12

Dakota Territory Organic Act, 12 Stat. 239 — 18

Enabling Act of February 22, 1889, 25 Stat. 676 § 4 — 18

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,

Petitioner,

v.

THE STATE OF SOUTH DAKOTA, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF JACKSON COUNTY, SOUTH DAKOTA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

This lawsuit had its genesis in the State of South Dakota's former system of county government as established by state law. The state was divided into counties, some of which were organized and some unorganized for purposes of county administration and government. Organized counties had elected officials, such as county commissioners, judges, county clerks, register of deeds, auditor, treasurer and county attorney. Officials of organized counties administered the affairs of attached unorganized counties as well as their own.

Since the early 1900s, Washabaugh County was an unorganized county within the Pine Ridge Indian Reservation which was attached to organized Jackson County. According to the 1970 census, Washabaugh County consisted of approximately 685,000 acres and 1,389 people, of whom 772 were Indians. Jackson

County had a population of roughly 1,531 people with only 86 Indians. Both counties were therefore sparsely populated and located in a rural area.

Washabaugh and Jackson Counties had an ongoing relationship well before their 1979 consolidation. Jackson County provided all governmental services to Washabaugh County, except that the Washabaugh County Road Board supervised the construction and maintenance of all highways, roads and bridges within Washabaugh County.

Shortly after the decision in Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975), where the Eighth Circuit Court of Appeals ruled that residents of unorganized counties must be permitted to vote for county officials of the organized county to which they are attached, residents of Washabaugh County circulated petitions in July 1976 seeking a general election on the

issue of consolidating Washabaugh County with Jackson County. Both Indian and non-Indian residents signed these petitions. The consolidation issue appeared on the November 2, 1976, general election ballot. Because a majority vote had been obtained in both counties in favor of consolidation, the Governor of the State of South Dakota issued a proclamation creating the consolidation and making it effective as of January 1, 1979.

After consolidation occurred, the functions of county officials remained unchanged. The Washabaugh County Road Board, however, was terminated and its responsibilities were assumed by the Board of County Commissioners of Jackson County. Consolidation did not augment the authority of Jackson County over Indians living within the boundaries of what was formerly Washabaugh County. Jackson County officials, however, provide various services for both Indians and non-Indians.

Since the consolidation, Jackson County still provides only the most fundamental services: license plates, recording deeds and birth and death certificates; keeping of tax records; distribution of food stamps; veteran benefits and services; highway, road and bridge maintenance; public school system; police protection; and judicial services. It has not implemented a comprehensive system of regulations and ordinances.

B. PROCEEDINGS BELOW

On May 13, 1977, the Oglala Sioux Tribe instituted this lawsuit by filing an action for declaratory and injunctive relief against the State of South Dakota and the County of Jackson. The Tribe sought to obtain a permanent injunction preventing the proposed consolidation of Washabaugh County to Jackson County for purposes of government and administration under South Dakota law. With its complaint, the Tribe filed an application for

a temporary restraining order to enjoin consolidation of the two counties, which was denied on December 18, 1978. A hearing on the Tribe's motion for a preliminary injunction was held on December 20, 1978. On December 25, 1978, the court denied that motion, finding that the Plaintiff had failed to demonstrate that its powers as a tribe would be significantly affected by the consolidation of the counties. On January 1, 1979, the consolidation of the two counties was effectuated.

On December 20, 1978, the Tribe filed an amended complaint seeking the same basic relief as before. Thereafter, on September 11, 1981, the Tribe filed a second amended complaint. Jackson County and the State filed their answers on May 4, 1982, and May 10, 1982, respectively.

A trial on the merits was held on October 11-13, 1983. On December 27, 1983,

the district court entered a memorandum opinion. The court concluded that the consolidation of Washabaugh and Jackson Counties neither interferes with the Tribe's right of self-government nor is prohibited by federal law. The court found that the Tribe failed to provide any evidence that consolidation increased the scope of state governmental activity in the Washabaugh County area, and, therefore, it did not infringe on Plaintiff's rights to self-government. On December 10, 1983, the district court entered a final judgment for Jackson County and the State.

On January 5, 1984, the Tribe moved to amend and supplement the court's memorandum opinion with findings of fact and separate conclusions of law consistent with the requirements of Rule 52(a) of the Federal Rules of Civil Procedure. On June 29, 1984, the district court issued a supplemental memorandum opinion denying the Tribe's motion.

On July 27, 1984, the Tribe filed its appeal to the Eighth Circuit. In a decision filed August 15, 1985, the Eighth Circuit Court of Appeals affirmed the judgment of the district court, specifically finding that the mere existence of a general purpose state governmental body on the Pine Ridge Reservation is not preempted by federal law nor impermissibly infringed upon tribal self-government.

SUMMARY OF ARGUMENT

While Indian reservations as a general rule are places where Indian people may govern themselves free from state interference, state law may somtimes govern activities within a reservation, particularly of non-Indians. The consolidation of Jackson and Washabaugh Counties does not violate federal law or treaties or interfere with tribal self-government. The Tribe has not charged or proven that a specific state or

county ordinance has interfered with its right to self-government or some other right established by federal law, and the relief it requests is not directed at any such specific fact situation. The United States Court of Appeals for the Eighth Circuit correctly held that the consolidation of the two counties in and of itself did not violate the right of the Tribe to govern itself. Since the federal question of law decided does not conflict with applicable decisions of this Court on the subject, the petition of the Oglala Sioux Tribe for a writ of certiorari should be denied.

ARGUMENTS AND AUTHORITIES

THE UNITED STATES COURT OF APPEALS WAS CORRECT IN HOLDING THAT A STATE IS NOT PRECLUDED FROM INCLUDING AN ORGANIZED COUNTY WITHIN THE BOUNDARIES OF AN INDIAN RESERVATION.

A. GENERAL PRINCIPLES

In the early days of the United States, Indian reservations were, in a real sense,

separate from the states which surrounded them. Chief Justice Marshall stated in Worcester v. Georgia, 5 Pet. (31 U.S.) 515, 557 (1832), "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union."

Since those early days, however, the position of Indian tribes in the American scheme of government has changed considerably, and "notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians." McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 171 (1973).

Thus, generally state laws apply to the actions of non-Indians on a reservation if Indians are not affected. For example, a

non-Indian committing a crime against a non-Indian would be subject to state law. United States v. McBratney, 104 U.S. 621 (1882); Draper v. United States, 164 U.S. 240 (1896); United States v. Antelope, 430 U.S. 641, 644, n. 4 (1977); United States v. Dodge, 538 F.2d 770, 775 (8th Cir. 1976), cert. denied, 429 U.S. 1099 (1977). Likewise, a non-Indian would be subject to state tax for transactions arising on an Indian reservation if Indians are not significantly affected. Utah and Northern Ry. v. Fisher, 116 U.S. 28 (1885); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 481-483 (1976); Washington v. Confederated Tribes, 447 U.S. 134 (1980).

Secondly, some state authority applies directly to Indians on Indian reservations. For example, in 18 U.S.C. 1161, Congress required that all sales of alcoholic beverages on a reservation must be in compliance

with state law, including any state licensing requirements. See Rice v. Rehner, 436 U.S. 713, 103 S.Ct. 3291 (1983). In 25 U.S.C. 231, Congress authorized state agents to go on Indian reservations to inspect health and educational conditions and to enforce state "sanitary and quarantine regulations." In the McCarran Amendment, 43 U.S.C. 666, Congress authorized state courts to adjudicate Indian water rights through the joinder of the United States (as trustee for the Indians) in comprehensive state water rights adjudications. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 103 S.Ct. 3201 (1983). Similarly, in Moe v. Confederated Salish and Kootenai Tribes, supra, and Washington v. Confederated Tribes, supra, the Court held that the state could require Indians to collect state taxes on reservation sales of cigarettes to non-Indians. Cf. Three Affiliated Tribes v. Wold Engineering,

__ U.S. __, 104 S.Ct. 2267 (1984)(state courts may adjudicate suits by Indians against non-Indians arising on a reservation).

In sum, Chief Justice Marshall's pure concept of Indians living wholly apart from states no longer exists; and to some degree, state law has an effect on Indian reservations. Moreover, in recent decisions, the Supreme Court has clarified the rule for determining whether or not state law applies. Except where Congress has expressly made state law applicable, tribal members themselves while within their reservations are generally not subject to state law. McClanahan v. Arizona State Tax Commission, supra; Bryan v. Itasca County, 426 U.S. 373 (1976). But a state's assertion of authority as against non-members on an Indian reservation is forbidden by federal law only (1) if it would undermine the "right of reservation

Indians to make their own laws and be ruled by them"; Williams v. Lee, 358 U.S. 217 (1959); or (2) if the state authority is preempted by federal law. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 836-838 (1982); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-336 (1983).

This test is not suited for broad generalizations. The Court described its application in Bracker, supra, 448 U.S. at 145:

> This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

B. THE PRESENT CASE

In the present case, the Tribe argues that federal law prohibits the consolidation

of Jackson and Washabaugh Counties, with the resulting inclusion of Pine Ridge Reservation territory within the boundaries of an organized county. Accordingly, the principles set out above apply: the state action is forbidden only if it either interferes with tribal self-government or if it is preempted by state law.

1. Self-government.

The consolidation does not, in and of itself, interfere with the right of the Oglala Sioux Tribe to govern itself. At this stage, the consolidation is only a change in the framework of state law, and has no visible effects on individual Indians on the reservation or the operation of tribal government itself.

There are a number of actions to be sure which the County might take which would conflict with tribal self-government or be inconsistent with federal law; but such a

possibility does not make all potential actions by the county illegal because they interfere with tribal self-government. The unspecified potential for such actions does not entitle the Tribe to the broad relief they seek.

In its petition for writ of certiorari, the Tribe attempts to raise as an issue county taxation methods. The issue was not addressed at trial. Even so, the Tribe's claim that their right to self-government is interfered with on this basis is incorrect. Only an individual taxpayer has the standing to challenge taxation by the county. Unless an individual taxpayer makes an objection, there is no basis to make an inquiry as to the race of the owner. Furthermore, even if the individual did raise the issue, there would still need to be a further determination on whether the individual Indian had

"severed his tribal relations." United States v. Rickert, 188 U.S. 432, 25 S.Ct. 478, 482 (1903).

Unless the Tribe can establish that the system of county taxation interferes with the Tribe's taxation scheme--and they cannot--the preemption analysis does not apply. As this Court stated recently.

> The mere existence of state authority to tax doesn't deprive the Indian tribe of its power to tax . . . There is no direct conflict between the state and tribal schemes since each government is free to impose its taxes without ousting the other.

Merrion v. Jicarilla Apache Tribe, 450 U.S. 130, 151 (1981).

2. Federal preemption.

The Tribe's petition spends most of its space on federal preemption. The Tribe does not set out specific factual situations where a particular county activity is preempted,

and the relief it seeks is broad--to eliminate the county. Instead, the Tribe concentrates its arguments on treaties and statutes which it claims prohibit state jurisdiction over its reservations.

a. The 1861 Dakota Territory Organic Act and the 1889 Enabling Act

The Tribe relies on two general federal statutes for the proposition that the State may have no jurisdiction at all on the reservation. The first of these, the Dakota Territory Organic Act, 12 Stat. 239, states that if a treaty requires that tribal lands not be included within the boundaries of a state or territory, then that land will be "excepted out of the boundaries and constitute no part of the Territory of Dakota . . . ." The second of these is the Enabling Act of February 22, 1889, 25 Stat. 676. Section 4 of that act disclaims "all right

and title . . . [to lands] owned or held by any Indian or Indian tribes," and states that those lands "shall remain under the absolute jurisdiction and control of the Congress of the United States." 25 Stat. 677.

The first of these two acts is no longer effective here since the Dakota territory no longer exists. In any event, it merely reflects "extraterritorial" status of a reservation if the treaty creating the reservation so requires, and therefore adds nothing to the legal status of a reservation.

The second of these two acts still has vitality, though it has limited application. The "disclaimer" provision in the Enabling Act is found in virtually the same form in the enabling acts of many of the western states. Arizona v. San Carlos Apache Tribe, supra, 103 S.Ct. at 3211, and n. 12. It is, moreover, the very same statute governing the admission of Washington and Montana where it

was found to erect no absolute shield against state jurisdiction. See Washington v. Yakima Indian Nation, 439 U.S. 463 (1979); Montana v. United States, 450 U.S. 544 (1981). The purpose of the Act was to assure that the states would not become directly involved in Indian affairs, at least without permission of the federal government. Plainly, this provision is wholly compatible with the two-prong test set out in recent decisions of the Supreme Court to determine whether a particular exercise of state jurisdiction is acceptable. Three Affiliated Tribes v. Wold Engineering, supra, 104 S.Ct. at 2271, 2274-2275; Arizona v. San Carlos Apache Tribe, supra, 103 S.Ct. at 3210-3212. Cf. Draper v. United States, supra, cited by the Court in San Carlos. It does not require that the reservation be "extraterritorial" to the state.

b. The 1868 Treaty of For Laramie and the Act of March 2, 1889

The Tribe places chief reliance on these two tribal agreements. The 1868 Fort Laramie Treaty, set out at 15 State. 635, established a large reservation (generally called the Great Sioux Reservation) "for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." It also gave the promise of the United States that no other persons, except federal officers, would be permitted on the reservation "except as hereinafter provided." Article II of the Treaty, 15 Stat. 636.

Article XII of the Treaty, 15 Stat. 639, set out conditions for the modification of the reservation's boundaries:

> No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same. . . .

The Act of March 2, 1889, 25 Stat. 888, substantially changed both the scope and the nature of the reservation created by the 1868 Treaty. Sections 1 through 7 of the act create smaller reservations for the various bands of the Sioux Tribe. The land outside of those reservations is restored to the public domain under Section 21.

Sections 8 through 11 permit the President to make allotments of land to individual Indians, pursuant to the General Allotment Act, with the permission of each band. Significantly, under Section 11, "the law of descent and partition in force in the State or Territory" is made applicable to the allotments. Article 12 permits the President

to negotiate for the purchase of portions of the new reservations not allotted, with the land to be sold to bona fide settlers. Section 30 of the Treaty requires the Secretary of the Interior to have schools built on the new reservations. The section further states that "any white children residing in the neighborhood are entitled to attend the said school on such terms as the Secretary of the Interior may prescribe."

Section 19 provided, inter alia, that the provisions of the Treaty of 1868 should remain in force "if not in conflict with the provisions and requirements of this act." Section 28 requires approval by the Indians as follows:

> That this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the (1868 treaty) . . ., which said acceptance and consent, shall be made known by proclamation by the

> President of the United States upon satisfactory proof presented to him . . ., which proof shall be presented to him within one year from the passage of this act; and upon failure of such proof and proclamation this act becomes of no effect and null and void.

It is undisputed that the President issued a proclamation, 26 Stat. 1554, finding appropriate approval of the act by three-fourths of the adult male Indians on the reservation.

The Tribe argues that the 1868 Treaty set aside the Great Sioux Reservation for the exclusive use of the Indians, and that therefore it was outside of the boundaries of any state and thus could not be included within an organized county. This claim is without merit. The 1868 Fort Laramie Treaty was abrogated by the enactment of subsequent federal statutes reducing the reservation to individuals, including the Act of March 2, 1889. The allotment of reservation lands and the later alienation of a large amount of

those lands implicitly abrogates the "exclusive use" provision of the treaty. Montana v. United States, 450 U.S. 544 (1981); Puyallup Tribe, Inc. v. Department of Game of Washington, 433 U.S. 165 (1977).

Apart from the specific language of the treaty and the case law, and merely as a matter of Indian "common law," the Pine Ridge Reservation should not be treated differently with regard to state jurisdiction than other Indian reservations. No one in this case has disputed the general principle that Indian tribes are entitled to self-government and that states generally lack the authority to govern the affairs of Indians on reservations. However, the fact remains that reservations are within the boundaries of states and the decisions of this Court have made it clear that in some circumstances the states have a legitimate interest in the activities on the reservation, particularly

among the non-Indian population. Similarly, the Indian citizens living on reservations have a real interest in the affairs of the state encompassing the reservation. In view of these broad holdings, it is inconsistent with the modern positions of Indian tribes in the federal scheme of the United States for a reservation to be wholly outside any state jurisdiction. See United States v. Wheeler, 435 U.S. 313, 323 (1978). If for no other reason this should defeat the Tribe's argument that the state has no right to include the reservation within the boundaries of a county.

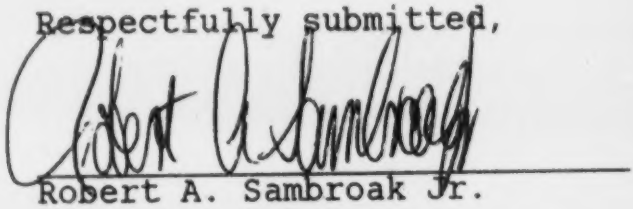
CONCLUSION

As set forth above there is little doubt that the Pine Ridge Reservation is subject to some limited state jurisdiction. Because of this jurisdiction, it is appropriate for the State of South Dakota to include the reservation within the framework of an organized

county. In view of the fact that the decision of the United States Court of Appeals for the Eighth Circuit so holding does not conflict with applicable decisions of this Court, the Tribe's petition for writ of certiorari should be denied.

Dated this 2nd day of January, 1986.

Respectfully submitted,



Robert A. Sambroak Jr.
Attorney at Law
PO Box 400
Kadoka, South Dakota 57543
Telephone: (605) 837-2284

Attorney for Jackson County,
South Dakota